IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-122

LAWRENCE CANTOR d/b/a SELDEN DRUGS COMPANY, individually and on behalf of all other retail sellers of light bulbs similarly situated,

Petitioner,

vs.

THE DETROIT EDISON COMPANY,
a New York Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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INDEX

	PAGE
Questions Presented	1
Statement of the Case	2
A. Proceedings Below	2
B. Detroit Edison	3
C. The Lamp Supply Program	4
D. The Regulatory Framework	9
1. Background	9
2. The Relationship between State Regulation and Municipal Franchises	10
3. Pervasive Regulation by the MPSC	10
E. Regulatory Sanction for the Lamp Supply Program	13
F. The Opinions Below	18
Summary of Argument	19
Argument:	
I. Detroit Edison's Lamp Supply Program Is Required by State Legislative Command and Should Not Therefore be Subject to the Federal Antitrust Laws	23
A. A Private Party Does Not Incur Liability under the Federal Antitrust Laws for Obeying the Command of a State	23
B. Detroit Edison's Lamp Supply Program Is Required by a Continuing State Command	29
C. Respondent's Situation Is Generally Similar to That in *Parker* v. *Brown* and *Gordon* v. *New York Stock Exchange*	31

PAGE

1. *Parker* v. *Brown* Rejected Federal Antitrust Liability for Marketing Schemes Proposed by Agricultural Producers and Approved by the State 32

2. *Gordon* v. *New York Stock Exchange* Rejected Federal Antitrust Liability for Fixed Commission Rates That Were Privately Proposed and Accepted by Government 34

D. The Courts of Appeals Have Consistently Applied *Parker* v. *Brown* to Protect Pervasively Regulated Utilities from Collateral Antitrust Attacks upon Their Rates and Service Offerings. These Decisions Are Sound and Are Fully Consistent with *Jackson* v. *Metropolitan Edison* 36

II. The Clear Benefit of Respondent's Lamp Supply Program to Consumers and the Absence of Consumer Objection Make Unnecessary More Detailed Regulatory Review 40

A. Detroit Edison's Lamp Supply Program Produces Substantial Benefits to Consumers and Is Consistent with the Goals of the Antitrust Laws 41

B. Petitioner's Antitrust Claim Is Adverse to the Public Interest Which the MPSC Has Served in Mandating Respondent's Lamp Supply Program 44

III. Petitioner's Failure To Invoke Available State Remedies Should Preclude His Present Action for Treble Damages 47

A. Adequate State Remedies Were Available to Petitioner 49

B. Petitioner Seeks To Burden Federal Antitrust Courts with Novel State Law Questions Which Could Be Resolved by the MPSC and Its Reviewing Courts 50

PAGE

C. Requiring Prior Resort to State Regulatory Procedures Should Clarify Any Unresolved Issues Relating to *Parker* v. *Brown* Immunity and Thereby Reduce the Risk That a Regulated Utility Would Suffer Treble Damage Liability for Reasonable Reliance on State Commission Action 53

D. Allowing Antitrust Treble Damage Recovery Would Discourage Use of Normal State Administrative Processes 57

E. Requiring Resort to the Michigan Public Service Commission Would Assure Consideration of the Lamp Program by a Body Which Will Give Notice to Consumers and Consider Their Interest 59

Conclusion 60

Statutory Appendix ..... App. 1

Proceedings and Orders of the Michigan Public Service Commission 1b

CITATIONS

Cases:

Board of Governors of the Federal Reserve System v. *Agnew*, 329 U.S. 441 (1947) 51

Business Aides, Inc. v. *Chesapeake & Potomac Tel. Co.*, 480 F.2d 754 (4th Cir. 1973) 36

California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 20, 27

Chastain v. *American Telephone and Telegraph Co.*, 5 CCH Trade Reg. Rep. ¶60,519 (D.D.C. 1975) 38

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 55, 57

City of Detroit v. *Public Utilities Commission*, 288 Mich. 267, 286 N.W. 368 (1939) 52

PAGE

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Condosta v. *Vermont Electric Cooperative, Inc.*, 44 U.S.L.W. 2156 (D. Vt. 1975) 39

Connell Construction Co. v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975) 42

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Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) 24, 27

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Re The Detroit Edison Company, 94 P.U.R. 3d 298 (1972) 12, 15

Re The Detroit Edison Company, 88 P.U.R. 3d 68 (1970) 12

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Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 19, 27, 28

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PAGE

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George R. Whitten, Jr., Inc. v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970) 36

Goldfarb v. *Virginia State Bar Association*, 421 U.S. 773 (1975) 19, 20, 24, 25, 27, 30, 46

Gordon v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) 19, 20, 31, 34, 35

Gulf States Utilities v. *Federal Power Commission*, 411 U.S. 747 (1973) 22, 40, 50

Hanna v. *Plumer*, 380 U.S. 460 (1965) 58

Re Hartford Electric Light Co., Dkt. No. 10047 P.U.R. 3d Annual (1962) 5, 49

Hecht v. *Pro-Football, Inc.*, 444 F.2d 931 (D. C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 25

Huron Portland Cement Co. v. *Michigan Public Service Commission*, 351 Mich. 255, 88 N.W.2d 492 (1958) 51, 55

International Telephone & Telegraph Corp. v. *General Telephone & Electronics Corp.*, 351 F. Supp. 1153 (D.C. Haw. 1972), *aff'd in part and rev'd in part* 518 F.2d 913 (9th Cir. 1975) 38

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) 28, 36, 38, 39

Jeffrey v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) 36, 37

Lucas v. *Wisconsin Electric Power Co.*, 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973) 39

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Marnell v. *United Parcel Service of America, Inc.*, 260 F. Supp. 391 (N.D. Calif. 1966) 38

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PAGE

Nader v. *Allegheny Airlines, Inc.*, 512 F.2d 527 (D.C. Cir. 1975) 11
Northern California Power Agency v. *Public Utilities Commission*, 5 Cal. 3d 370, 486 P.2d 1218 (1971) 50
Northern Natural Gas Co. v. *Federal Power Commission*, 399 F.2d 953 (D.C. Cir. 1968) 43, 46
Northern Securities Co. v. *United States*, 193 U.S. 197 (1904) 25, 26
Olsen v. *Smith*, 195 U.S. 323 (1904) 24
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 37, 56
Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 328 Mich. 650, 44 N.W.2d 324 (1950), *aff'd*, 341 U.S. 329 (1951) 46, 51
Parker v. *Brown*, 317 U.S. 341 (1943) 3, 18, 19, 23, 24, 25, 26, 27, 30, 31, 32, 33, 34, 36, 37, 48, 53, 55, 56, 60
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1969) 33
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) 22, 48, 53, 54, 55, 56, 57
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 43
Schwegmann Brothers v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) 26, 27
Simpson v. *Union Oil Co.*, 377 U.S. 13 (1964) 55, 57
Srack v. *Northern Natural Gas Co.*, 391 F. Supp. 155 (S.D. Iowa 1975) 39
Travelers Insurance Co. v. *Blue Cross of Western Pennsylvania*, 298 F. Supp. 1109 (W.D. Pa. 1969) 38
Udall v. *Federal Power Commission*, 387 U.S. 428 (1967) 40
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United States v. *Colgate & Co.*, 250 U.S. 300 (1919) 29
United States v. *General Electric Co.*, 272 U.S. 476 (1926) 46
United States v. *General Electric Co.*, 358 F. Supp. 731 (S.D.N.Y. 1973) 46

PAGE

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United States v. *Pacific Southwest Airlines*, 358 F. Supp. 1224 (C.D. Calif. 1973), *cert. dismissed*, 414 U.S. 801 (1974) 38
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United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 50, 51
Valentine v. *Michigan Bell Telephone Co.*, 388 Mich. 19, 199 N.W.2d 182 (1972) 51, 57
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Woods Exploration and Producing Co. v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 36
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Statutes and Rules:

16 C.F.R. § 409.1 (1974) 7
Civil Rights Act of 1871, 42 U.S.C. § 1983 ..... 38, 39
Clayton Act, Section 3, 15 U.S.C. § 14 2
Law of June 3, 1933, ch. 754, § 3, [1933] Calif. Stats. 1970-1971 (repealed 1967) 32

Michigan Administrative Code:
R.460.21-460.27 ..... 13, 59
R.460.31-460.37 ..... 17, 49
R.460.3587 14

Michigan Complied Laws Annotated Sections:
460.1 11
460.4 ..... 9, 30, 50
460.6 ..... 10, 11
460.6a 11, 13, 29, 49
460.53 ..... 9, 30

PAGE

460.54 ..... 42, 52
460.58 ..... 17, 49, 58
460.101 9
460.501 ..... 11, 50
460.551 ..... 9, 30
460.552 ..... 9, 30
460.553 9
460.554 9
460.555 9
460.556 9
460.557 ..... 9, 11, 17, 49, 50, 58
460.558 ..... 9, 30
460.559 9

Michigan Constitution, Article VII, Section 29 (1963) 52

Securities Exchange Act of 1934, Section 19(b), 15 U.S.C. § 78s(b) 34, 35

Sherman Act, Section 1, 15 U.S.C. § 1 2
Section 2, 15 U.S.C. § 2 2

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Brief for the United States as *Amicus Curiae, Parker* v. *Brown,* 317 U.S. 341 (1943) 37

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PAGE

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R. Taylor, *Electricity* (1975) 4

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BRIEF FOR THE RESPONDENT

Questions Presented

Does a state regulatory commission's order which affirmatively approves an electric utility's tariff and requires the utility to adhere to the rates and services in the tariff constitute a command of the state which exempts the utility from the federal antitrust laws for adhering to the tariff?

Do the federal antitrust laws prevent a state regulatory commission from approving, without a special hearing, a public utility's service offering which reduces the cost of electric lighting to the utility's customers?

Should petitioner be obliged to invoke available state remedies before being allowed to bring a federal treble damage action against a state approved service offered by a regulated public utility?

Statement of the Case

A. Proceedings Below

The present case is a purported class action which seeks treble damages under the federal antitrust laws against The Detroit Edison Company ("Detroit Edison") on behalf of the named plaintiff Lawrence Cantor ("Cantor"), a retail drug store proprietor in Detroit, Michigan, and all others similarly situated.[1] Plaintiff commenced this action on July 6, 1973 in the Eastern District of Michigan, Southern Division (2a),[2] with federal jurisdiction being invoked pursuant to 28 U.S.C. § 1337.

Plaintiff's complaint alleges that Detroit Edison's supplying of light bulbs to its residential customers constitutes a violation of Section 2 of the Sherman Act (15 U.S.C. § 2) and Section 3 of the Clayton Act (15 U.S.C. § 14).[3]

1. No motion for class action determination has yet been made.

2. All references are to pages in the Appendix.

3. Petitioner states in his brief that he has alleged a tying arrangement in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), Brief for the Petitioner ("Petitioner's Brief") at 3. Petitioner's complaint (2a-20a) does not allege any claim under Section 1. Instead, Count I of his complaint charges, in paragraph 13(6a), an "unreasonable restraint of trade and attempt to monopolize and monopolization of the sale of standard size and quality incandescent light bulbs in the territory serviced by [Detroit Edison], in violation of § 2 of the Sherman Anti-Trust Act . . .". In Count II petitioner alleges that the "requirement" by respondent that customers to whom light bulbs are offered

> pay a rate which includes a charge for light bulbs as a condition of purchasing electric energy service constitutes an illegal 'tie-in' requirement in restraint of trade and commerce in the sale of incandescent light bulbs in violation of § 3 of the Clayton Act.

The relief which petitioner seeks is to have Detroit Edison "temporarily and permanently enjoined from requiring the purchasing of incandescent bulbs in connection with the sale for *(sic)* electric energy. . . ." (7a). Petitioner also seeks treble damages for his alleged class plus reasonable attorney's fees and costs.

Detroit Edison served and filed an answer (21a) to petitioner's complaint denying his allegations and moved for summary judgment (24a). Pursuant to stipulation (48a), only that portion of respondent's motion which relied upon this Court's decision in *Parker* v. *Brown,* 317 U. S. 341 (1943) was presented to the District Court. The District Court granted Detroit Edison's motion with an opinion on July 2, 1974 (56a) and entered judgment for Detroit Edison on August 21, 1974 (60a-61a).

The District Court's opinion was affirmed by the Court of Appeals for the Sixth Circuit on April 23, 1975 in a memorandum opinion which adopted the opinion of the District Court (62a).

B. Detroit Edison

Detroit Edison is a public utility which supplies electricity to over 1.5 million customers in Detroit and southeastern Michigan (3a, 9a-19a, 21a).[4] In 1972, Detroit Edison had 1,573,838 electrical customers and, of these, 1,454,513, or 92%, were residential customers. *Moody's*

4. Detroit Edison and its predecessors have continually engaged in the supply of electricity for illumination to consumers since 1886. Detroit Edison, incorporated in 1903, is the successor to the Edison Illuminating Company of Detroit, incorporated in 1886, and certain other electric utilities that operated in Michigan. *See* R. C. Miller, *Kilowatts at Work: A History of the Detroit Edison Company* 19 *et seq.* (1957); *Moody's Public Utility Manual* 34-36 (1975).

Public Utility Manual 34-36 (1975).[5] Service to residential customers is embodied in Detroit Edison's Domestic Service Rate (41a), while service to commercial and most small industrial customers is reflected in the General Service Rate and the Large General Service Rate (41a, 330a-339a).

C. The Lamp Supply Program

Since 1886, Detroit Edison and its predecessors have provided limited amounts of certain standard size light bulbs to electrical customers without additional charge.[6] New residential customers are provided with light bulbs in "such quantities as may be needed" for all of their permanent fixtures (214a). Thereafter Detroit Edison replaces residential customers' burned out light bulbs (214a) in proportion to their estimated use of electricity for lighting. The customer incurs no direct charge for such light bulbs at the time they are furnished to him. Instead this service is incorporated in Detroit Edison's Domestic Service Rate and General Service Rate which tariffs have been approved by the Michigan Public Service Commission ("MPSC") and its predecessors since 1916 with the lamp supply program specifically set forth.[7] The most recent Domestic

5. Data as to customers is an annual average for 1972, the most recent year for which cost information with respect to the lamp supply program is available in the record. The total population served by Detroit Edison is about 5 million, since several individuals may live in the household represented by a single customer. *Moody's, supra,* at 36.

6. The common light bulb is more technically called a "lamp". *See* R. Taylor *Electricity* 43 (1975). Detroit Edison's program for providing customers with light bulbs is thus referred to as a "lamp supply program."

7. As discussed in greater detail at pages 7 through 8 and page 17 of this brief, respondent makes no direct profit on this service. The cost of the light bulbs to Detroit Edison is simply included as part of the cost of service to customers and is not a part of respondent's rate base (26a-27a, 119a-122a), though certain very limited facilities used, *inter alia,* for distribution of light bulbs do form a part of this base (134a).

Service Rate in the record provides that Detroit Edison supply bulbs in accordance with "Lamp Supply Schedule Designation B-5.5" and that this supply be furnished "[e]ffective on service rendered on and after August 19, 1972 under authority of Order of the Michigan Public Service Commission dated August 18, 1972, in Case U-3910." (215a)[8]

The lamp supply program is almost universally used by respondent's eligible customers. According to a 1970 survey, approximately 94% of Detroit Edison's residential customers utilize the lamp supply program (301a).[9] The number of light bulbs exchanged annually has increased from 14,557,233 in 1963 to 18,564,381 in 1972 (29a), reflecting the popularity and public awareness of the program.[10] In 1963, the average number of lamps exchanged per customer was 10.09 and in 1972 this figure was 11.17 (29a). The lamp supply program accounts for 50% or less of the incandescent light bulbs distributed in respondent's service area and for only about 23% of light bulbs of all types when fluorescent and high intensity discharge lamps, which are not distributed by Detroit Edison through this program, are included (31a).

Detroit Edison furnishes light bulbs at its 35 customer service centers (9a, 102a-193a, 301a) and also utilizes some 50 agents to distribute bulbs (192a-193a). Respondent

8. Though this is the latest MPSC order in the record, subsequent orders have used the same language. Replacement of burned out light bulbs is also available to commercial customers encompassed in the General Service Rate (217a, 335a).

9. This widespread use distinguishes respondent's lamp supply program from those ordered discontinued because consumer use was small and the programs were thus considered discriminatory. *See Re Hartford Electric Light Co.,* Dkt. No. 10047, P.U.R. 3d, Annual 1962 (1961); *Re Wisconsin Gas & Electric Co.,* 9 P.U.R. (n.s.) 517 (1935); *Re Customers of Edison Electric Illuminating Co. of Boston,* 5 P.U.R. (n.s.) 369 (1934).

10. A 1955 survey indicated that the lamp supply program was "the service most desired by the public," of those services furnished by Detroit Edison (292a).

has endeavored to establish its centers in convenient locations (293a-294a). Most of respondent's customers who avail themselves of the lamp supply program obtain their light bulbs at the customer service centers (301a). There are approximately 14 types of bulbs involved in the program (30a) and, as petitioner concedes, these represent the most commonly used sizes. Petitioner's Brief at 4. Physical exchange of burned out bulbs is required to insure that persons inside and outside respondent's service area who do not pay an electric rate embodying the lamp supply program will not avail themselves of the service (196a-199a). This procedure is not burdensome to consumers and the procedure works because the Detroit Edison bulbs are specially designed and distinctively marked. The average customer exchanges bulbs about twice a year (301a).

Detroit Edison procures bulbs for the lamp supply program by a highly competitive process. It designs its own longer-life bulbs and then invites competitive bids from light bulb manufacturers. The successful recent bidders have been General Electric Company, Westinghouse Electric Company and Sylvania Electric Products Company. By competitive procurement Detroit Edison has obtained a higher quality bulb at a lower price than is generally available to customers in the service area through such persons as petitioner.[11] The light bulbs supplied under the lamp program are specially manufactured for Detroit Edison.[12] While bulbs generally available to consumers have an average life of 750 hours, the bulbs used in Detroit Edison's lamp supply program have an average life of 1350 hours

11. The prices bid by each of the three manufacturers from 1969 to 1973 are shown in Exhibits 2 and 3 (194a, 195a). Respondent's cost analysis for the purchase of bulbs for the lamp supply program in 1973 is also in the record (369a-390a).

12. Detroit Edison currently obtains these specially manufactured light bulbs from all three major manufacturers, though, in the past, they had been supplied by General Electric alone (29a).

(33a). The manufacturing process which provides the longer bulb life results in a lumen output approximately 8% less than that of the same wattage bulb generally available to consumers (33a). Detroit Edison fully discloses to consumers the wattage, average bulb life, lumens and the name of the manufacturer on the sleeve of each Detroit Edison light bulb (323a).[13] Detroit Edison receives test reports (363a-368a) from its light bulb suppliers relating to average wattage, lumens, and bulb life every six months based on the manufacturer's continuing testing program (83a). These test results are a factor taken into account in the purchase of bulbs by Detroit Edison (84a). The decision to have bulbs with a longer life specially manufactured for respondent was in response to the fact that customers have frequently requested such bulbs and came after an evaluation of longer life against some loss in lumens (30a).

The cost of the light bulbs used in Detroit Edison's lamp supply program was $2,363,328 in 1972 (37a).[14] Detroit Edison makes no direct profit from the lamp program and

13. This disclosure conforms to the Federal Trade Commission's trade regulation rule for the incandescent lamp industry. 16 C.F.R. § 409.1 (1974). Comparison of the sleeves of 100-watt bulbs furnished by respondent and those available commercially reveals (324a):

	Detroit Edison	Commercial
Watts	100	100
Lumens	1620	1750
Life (in hours)	1350	750

14. This reflects competitive bidding, as well as quantity and cash discounts.

instead recoups only its cost (26a-27a; 119a-122a).[15] In contrast, petitioner's retail light bulb sales yielded him a 50% markup on light bulbs (69a).

The ultimate cost savings to consumers are dramatic. For example, the prices paid by Detroit Edison for 100 watt bulbs ranged from 10.7 cents apiece in 1969 to 11.4 cents apiece in 1973 (194a, 276a-289a); and the total cost, including distribution expenses, was about 15 cents per bulb in 1972. In contrast the wholesale cost of a shorter-lived 100-watt bulb to petitioner in 1972 was 21 cents (80a) which he sold at retail for 32 cents (80,324a)[16] using the retail druggist's traditional 50% mark-up.[17] Thus, once the difference in bulb life is taken into account, the Detroit Edison 100 watt bulbs cost about 15 cents for 1350 hours, while 1350 hours from two of petitioner's 100 watt bulbs would cost about 60 cents. The total benefit to consumers of the Detroit Edison program is shown by the fact that the average consumer who used the program (and virtually all

15. For the last rate case which is reflected in the record, U-4257, which had as its test period the twelve months ending September 30, 1972, Detroit Edison included a direct expense of $2,835,000.00 as the total cost for the lamp program, a figure which contains allocated administrative and general expenses such as the cost of marketing personnel (27a, 36a). The average cost of bulbs in the lamp supply program for 1972 was thus approximately 15 cents including allocated administrative and general expenses ($2,835,000 divided by 18,564,381).

16. The cost to petitioner includes the wholesaler's own mark up. By contrast, Detroit Edison, as volume buyer, deals directly with manufacturers and thereby avoids any extra wholesale cost. The suggested retail price for the 100 watt bulbs petitioner purchased was 64 cents for a package of two (324a). Petitioner does not depart from the suggested retail price and has never had light bulbs "on sale" (67a).

17. As a scholar in this area points out, this 50% mark up has "long been a shibboleth" of retail druggists. J. C. Palamountain, *The Politics of Distribution* 246 (1955).

did), received electric light bulbs for the year 1972 at about $1.80 per consumer.[18]

D. The Regulatory Framework

1. *Background*

The State of Michigan began regulation of electric utilities in 1909, vesting regulatory power in the Michigan Railroad Commission. P.A. 1909, No. 106, §§1-9 in Michigan Complied Laws Annotated ("MCLA") §§460.551-460.559. The Railroad Commission was abolished in 1919 and its functions transferred to the Michigan Public Utilities Commission pursuant to P.A. 1919, No. 419, §3, as amended by P.A. 1925, No. 200, §1 in MCLA §§460.53 and 460.101. That commission was in turn abolished in 1939 and its functions transferred to the Michigan Public Service Commission pursuant to P.A. 1939, No. 3, §4 in MCLA §460.4. An appeal lies from a decision of the Michigan Public Service Commission to the state circuit court and ultimately to the Michigan Supreme Court.

18. This figure was calculated as follows: For 1972 Detroit Edison had an annual average of 1,454,513 residential customers and the lamp program was available to all of them. Additionally the program was available to certain of respondent's commercial customers who represented approximately 95% of Detroit Edison's total commercial customers (41a). For 1972, respondent had an annual average of 117,157 commercial customers (*Moody's Public Utility Manual* (1975) 34-36) or approximately 112,990 to whom the program was available. Thus the total number of customers to whom the lamp supply program was available in 1972 was 1,567,503. The cost per customer equals $2,835,000 divided by 1,567,503 or approximately $1.80. The current annual cost of the lamp supply program is about $2.00 per customer. *See* N.Y. Times, Nov. 30, 1975, §3 (Business and Finance) at 15. Detroit Edison's lamp supply program is thus quite different from that discontinued in *Consumer's Sanitary Coffee & Butter Stores* v. *Illinois Commerce Commission*, 348 Ill. 615, 181 N.E. 411 (1932), cited by petitioner (Petitioner's Brief at 30), where the utility's provision of light bulbs cost the consumer far more than purchasing them commercially and the bulbs offered were apparently no better than those available commercially.

2. *The Relationship between State Regulation and Municipal Franchises*

Detroit Edison provides electricity pursuant to franchises from various municipalities (53a). None of these franchises establishes rates for electrical services nor do they confer upon the respective municipalities any power to regulate Detroit Edison's rates (54a-55a)[19]. Instead, that power rests exclusively with the MPSC.

3. *Pervasive Regulation by the MPSC*

MCLA §460.6 vests the MPSC with "complete power and jurisdiction to regulate all public utilities in the State . . ." and with power and jurisdiction

> to regulate all rates, fares, fees, charges, *services,* rules, *conditions of service* and all other matters pertaining to the formation, operation or direction of such public utilities. (Emphasis supplied.)

19. Since 1950 all of Detroit Edison's franchises have contained uniform language (54a) that:

> Sec. 3. In consideration of the granting of this franchise, Grantee agrees that its rates and charges for electric service in the (city) of (name of city) shall not exceed its rates and charges for like service elsewhere in its service area, evidenced by its uniform rate schedules at the time on file with and approved by the Michigan Public Service Commission.

Moreover franchises enacted since 1961 have, in addition, contained the following language (54a-55a):

> It is understood that the grantee is subject to regulation by the Michigan Public Service Commission, and that any order, rule or regulation by that Commission or its successor, will prevail over any regulation herein contained or provided for in case of conflict.

Furthermore, some franchises secured or received prior to 1950 did contain a provision requiring rates and charges to be the same as in effect in Detroit, but since 1913 all rates, charges and conditions of service in Detroit have been duly authorized by the Michigan Public Service Commission (55a).

Furthermore, under MCLA §460.6 the MPSC is empowered

> to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including *electric light* and power companies . . . (Emphasis supplied.)

The MPSC consists of three members appointed by the governor for six year terms with the advice and consent of the State Senate. MCLA §460.1. By law no member can be "pecuniarily interested" in any public utility subject to the MPSC's jurisdiction or be retained or employed by any such public utility during his tenure. MCLA §460.1.

The heart of the MPSC's function is to regulate the "furnishing . . . [of] electricity for the production of light, heat, or power . . ." (MCLA § 460.501) in such a way as to insure that the public receives such service at the lowest cost. The Commission recently stressed this obligation to provide service to the public at the lowest possible cost in an opinion and order Adopting Standard Rate Application Filing Forms and Instructions, Case No. U-4771 at 1 (1975) (32b).[20] To this end, the law requires the MPSC to give due regard to the "cost, reasonable return on the fair value of all property used in the service, depreciation, obsolescence, risks of business, value of the service to the consumer . . ." in setting rates. MCLA §460.557.

The statute is very specific on the procedures to be followed in setting rates; and it thus makes clear that the utility cannot increase its rates directly or increase the rates indirectly by reducing service without the specific approval of the Commission. MCLA §460.6a. Notice must

20. This fact and subsequent information with respect to proceedings and orders by the MPSC are properly subject to judicial notice by this Court. *See,* e.g., *Nader* v. *Allegheny Airlines, Inc.,* 512 F.2d 527 (D. C. Cir. 1975); *Washington Gas Light Co.* v. *Baker,* 195 F.2d 29 (D. C. Cir. 1951). Copies of pertinent pages from the MPSC's proceeding and orders are included in the appendix to this brief; all references to that appendix are thus: (1b)

be given throughout the service area to insure that all potentially interested parties can appear, and specific evidentiary requirements are imposed which include an investigation and report by the MPSC's technical staff. Full and complete hearings are required prior to any alteration of rates, charges or services which would result in a rate increase or decrease. Formal hearings can be dispensed with only where proposed changes in rate schedules will result in no change in the cost of service tc customers. Thus increases or decreases require full consideration by the Commission. Moreover, rate cases are not an infrequent formality but rather have been an almost annual event over the past five years. See U-4257 filed in 1972 (*Re The Detroit Edison Company,* 3 P.U.R. 4th 209 (1974)), U-3910 filed in 1971 (*Re The Detroit Edison Company,* 94 P.U.R. 3d 298 (1972)), U-3697 filed in 1970 (*Re The Detroit Edison Company,* 88 P.U.R. 3d 68 (1970)). Respondent's last two rate hearings before the MPSC were U-4570, which was filed in 1974, and U-4807, which was filed in 1975. The MPSC audits the books of Detroit Edison for rate case purposes. To perform these audits the MPSC may send four men to the company for a period of four or five weeks. They review all of the expenses on the Company books (125a). These audits specifically include review of all facts of the company's operation and are very wide-ranged in nature (127a). The MPSC has on many occasions reviewed Detroit Edison's customer service programs including the lamp supply program (129a). These reviews are conducted for rate case purposes (129a).

These hearings are careful and detailed. They involve lengthy proceedings in which numerous intervenors take part and in which Detroit Edison's presentation is subject to extensive cross-examination. Rate cases in which Detroit Edison has been involved have varied from seven months to approximately 21 months (130a). For example,

in U-4570 there were 64 days of hearings, comprising some 7500 pages of testimony, with approximately half of those days devoted to cross-examination (34b-40b) of Detroit Edison's witnesses. For U-4807 there were 16 intervenors, including the Michigan State Attorney General, the Michigan State United Auto Workers Community Action Program Council, the Michigan Energy Users Group, the Environmental Defense Fund, and the Public Interest Research Group in Michigan (29b-31b).[21]

The hearings before the MPSC are taken up with objections by agency staff, various intervenors, and other witnesses to the inclusion of expenses and to the inclusion of items in the rate base (131a). When respondent submits proposed adjustments its officials are cross-examined by the MPSC staff and intervenors on any items which they find questionable. The MPSC staff and intervenors submit proposed adjustments on which they are cross-examined by other parties (131a). As a result of objections and statements of intervenors items of expense are excluded from time to time by the MPSC (131a). The rate hearing does more than just determine rates, it determines the rules and regulations under which respondent must provide service pursuant to the rates (136a).

E. Regulatory Sanction for the Lamp Supply Program

The costs of Detroit Edison's lamp program are a regulated component of cost in respondent's rates for electrical services for customers to whom the lamp supply program is available. The ultimate rates embodying this regulated component of cost are affirmatively approved and ordered into effect by the Michigan Public Service Commission.

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21. The right of an interested party to intervene in MPSC rate hearings is established in MCLA §460.6a and the procedure implementing this right is set forth in Michigan Administrative Code (1968 Supp.), R. 460.21-R. 460.27.

Disclosure of the expenses of the lamp supply program to the MPSC is made pursuant to MPSC required accounting procedures. This is currently done under the applicable uniform system of accounts promulgated by the Federal Power Commission which, since 1937, has required the expenses of this program to be set forth under Customer Installation Expense (39a).[22] This accounting is also required under the pertinent regulations of the Michigan Public Service Commission. *See* Michigan Administrative Code (1960 Supp.), R. 460.3587-Account #587 Customer Installation Expenses.

22. This accounting background is set forth in respondent's answers to interrogatories (39a-40a):

Interrogatory #12: Please state the reason why the light bulb expense is included under the caption, "customer installation expense" (this is believed to be account number 587) in rate filings made by Edison?

Answer: FPC—Customer Installation Expenses

"This account shall include the cost of labor, materials used and expenses incurred in work on customer installations in inspecting premises and in rendering services to customers of the nature of those indicated by the list of items hereunder,"

Labor:

Item 5—Installing, removing, renewing and changing lamps and fuses.

Material and Expenses:

Item II—Lamp and fuse renewals.

All accounting procedures are set up pursuant to procedures established and required by the Federal Power Commission. The foregoing is taken from FPC directions.

(a) For how many years was the light bulb program expense carried under the heading "customer installation expense"?

Answer: Since the inception of the above indicated classification of accounts by the FPC in 1937—36 years.

(b) Please state the name and dates of all previous accounts under which the expenses of the light bulb program was included in rate filing?

Answer: All of the accounts are Customer Installation expenses.

1961—to date	587	FPC Classification
1937—1960	762.2	FPC Classification
Prior to 1937	44 B1	DE Classification

While Detroit Edison's lamp supply program antedates regulation, respondent or its predecessors have regularly filed tariffs setting forth the lamp program with the appropriate state regulatory body. Detroit Edison's first such filing on its own behalf was in 1916 (269a). The filed tariffs conform to those ordered into effect by the MPSC in an opinion and order at the conclusion of a rate hearing (140a). The most recent tariff in the record is that for 1972 and represents the tariff ordered into effect by U-3910 (214a);[23] this makes the lamp supply program "effective on service rendered on and after August 19, 1972 . . ." (214a).[24]

One instance where the MPSC specifically considered the lamp program was in 1964, when Detroit Edison proposed to eliminate it for large commercial customers as part of a general *reduction* of rates to such customers in Rate Case No. U-1791 (332a-340a), on the ground that large commercial users could obtain fluorescent lamps, which were not covered by the program, to meet their specialized needs.

23. The MPSC's opinion and order in U-3910 is reported in 94 P.U.R.3d 298 (1972) and incorporates respondent's rates as part of the order. 94 P.U.R.3d at 306.

24. Previous tariffs conforming to those ordered into effect by the MPSC which contain the lamp supply program as a component of the service rate mandated also appear in the record. These put the lamp supply program in effect "under authority of Order of the Michigan Public Service Commission dated December 21, 1970, in Case U-3697" (227a), under authority of Order of the Michigan Public Service Commission dated May 4, 1967 in Case U-2731" (231a); "under authority of Order of the Michigan Public Service Commission dated November 4, 1965, in Case U-2139" (237a); and "under authority of Order of the Michigan Public Service Commission dated May 8, 1951" (241a). Similar tariffs under Order of the Commission or its predecessors appear in the record for 1949, 1947, 1946, 1943, 1941, 1940, 1938, 1936, 1929, 1924, 1920, 1918, and 1916 (242a-269a). The Order of the Commission which currently requires the lamp supply program was issued in U-4570 on February 3, 1975 (46b-52b).

The Commission's final order on the new rate structure made clear that it was

> Without prejudice to the power of this Commission at any time *on its own motion* or *on petition of any interested party* to inquire into and investigate the *rates, charges, practices and services* hereby approved.
>
> The Commission specifically *reserves jurisdiction of the matters herein contained* and the authority to issue such further order or orders as the facts and circumstances may require (339a). (Emphasis supplied.)

This proceeding also put into effect respondent's Domestic Service Rate which continued the services of the lamp program as to residential customers and the General Service Rate which continued the program for small commercial customers.

In short, in 1964 the Michigan Public Service Commission, after having, in its own words, "carefully considered the matter before it" (334a) clearly put into effect rates embodying the lamp program and specifically exercised its authority over the lamp program as well as expressly retaining jurisdiction over this "practice and service".

At the hearing on respondent's motion for summary judgment, Detroit Edison made an offer to the District Court of additional testimony[25] on the MPSC's scrutiny of the lamp program (170a-173a), an offer to which petitioner's counsel took strong objection (173a). This testimony would have indicated extensive consideration of the lamp supply program by the MPSC (170a) as well as the witness's own recommendation that the program be dis-

25. Respondent's subpoena to Kenneth Croy, then supervisor of the Electric Section at the MPSC's Public Utility Division (173a) is included in the record (380a).

continued, which was rejected at the staff level of the MPSC (170a).[26]

Regulation by the Michigan Public Service Commission allows Detroit Edison no direct profit on its provision of light bulbs. The only profit Detroit Edison makes, as a regulated public utility, is the rate of return allowed by the Michigan Public Service Commission on its rate base which is composed of net plant plus an allowance for working capital (97a). This rate base would, obviously, not include the main component of cost for the lamp program which is the cost of the light bulbs themselves. Detroit Edison's investment in customer centers where, among many other activities, light bulbs are distributed, is, of course, included in the rate base but elimination of the light bulb exchange program would not cause a reduction in the investment at these locations (27a, 134a). Detroit Edison's present allowed rate of return under Rate Case U-4570 is 8.57% (41b).

The lamp supply program has not been challenged by any intervenor in any rate case (132a). Additionally, the program has not been the subject of any complaint to the MPSC under MCLA §§460.58 and 460.557. Under the regulations of the MPSC implementing this statutory complaint procedure a consumer such as the petitioner could, without need for an attorney, challenge any "alleged unlawful or unreasonable acts, practices or omissions of" Detroit Edison before the MPSC. Michigan Administrative Code (1968 Supp.) R. 460.31 et seq. Apparently the only customer dissatisfaction with respondent's lamp supply program is that evinced by petitioner (37a) and he has not chosen to express that dissatisfaction to the MPSC (175a).

26. Another instance of regulatory scrutiny and approval of the lamp program by the MPSC, which does not appear in the record, but which is properly subject to judicial notice by this Court is in the appendix to this brief. This includes the order in Rate Case D-1722 (17b, 19b, 22b) which specifically adverts to the lamp supply program in describing the character of service offered by respondent to residential customers. Also included in the appendix to this brief are excerpts from the proceedings in U-4257 filed in 1972 which indicate regulatory scrutiny and review of the lamp program (1b-12b).

F. The Opinions Below

The District Court's opinion (56a-60a) rested on a finding that respondent had furnished the MPSC

> . . . with data including information on the free bulb exchange program from which the Commission derived a comprehensive schedule of rates and services. Then, after conducting its own investigation and hearings, the Commission ordered specific tariffs, making this plan mandatory for residential subscribers (59a).

On this basis the Court held that the MPSC's affirmative action "in approving the rate structure and the continuing supervision" of respondent by the MPSC (59a) was state action requiring Detroit Edison to furnish light bulbs and the program was thus not subject to the antitrust laws. Moreover, the District Court rejected petitioner's claim that adequate regulatory scrutiny had not been shown:

> Neither statute, case law nor common sense requires the state to scrutinize each small facet of a comprehensive scheme for its effect on competition. And certainly the court should not step in when the Commission has not even been approached by plaintiff (60a).

The Court of Appeals for the Sixth Circuit affirmed the District Court in a memorandum opinion which recognized that the decision below followed the applicable precedents

> in concluding that the affirmative action of the Michigan Public Service Commission in approving appellee's rate structure that provides for the distribution of light bulbs and its continuing supervision of appellee brings the challenged practice within the doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943).

Summary of Argument

Parker v. *Brown,* 317 U. S. 341 (1943) and *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975) both make clear that private conduct required by the command of a state is not subject to the federal antitrust laws. As a necessary corollary to this rule, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961) makes equally clear that a private firm does not incur any liability under the federal antitrust laws for proposing to a state body, that it mandate private conduct which would otherwise violate the antitrust laws.

In the present case, petitioner seeks to impose liability for treble damages under the federal antitrust laws upon a pervasively regulated Michigan public utility for providing a service that is required by state command. This service, one which is very popular with consumers and also saves them a considerable amount of money, is embodied in the tariffs filed by the respondent with the Michigan Public Service Commission. Thus the lamp program is part of the basic electric service rate ordered into effect by the Commission after hearings. Furthermore, under Michigan law respondent cannot discontinue the tariffed practice, thereby indirectly increasing the effective rates to Michigan electric customers, without the express approval of the Commission. In short, the MPSC has commanded respondent to carry out a service contained in an approved tariff and this directive represents precisely the kind of sovereign command contemplated by *Parker* v. *Brown.*

This case is, in substance, quite similar to *Gordon* v. *New York Stock Exchange,* 422 U .S. 659 (1975), where a regulated organization submitted proposals which were then approved by its regulator. In *Gordon* the New York Stock Exchange ("Exchange") had proposed rates to the Securities and Exchange Commission ("SEC"); and the SEC, after some informal hearings, allowed those rates to go into

effect. Under those facts, this Court held that the existence of the SEC's formal authority and its less formal supervision of the rates proposed by the Exchange insulated them from antitrust liability. Yet in *Gordon* there was no command from the SEC to the Exchange that was as clear and binding as that from the MPSC to respondent. Furthermore, the fixed commission rates in *Gordon* were plainly anticompetitive while the challenged practice in this case provides consumers with a desired service at substantial savings. Thus, unlike both *Gordon* and *Goldfarb,* the instant action presents no claim that a government agency lent its imprimatur to private price fixing.

Since it furnished light bulbs pursuant to a command of the state, Detroit Edison should incur no antitrust liability for having proposed to the MPSC a tariff which contains this service. Respondent's presentation of its tariff to the Commission did not involve the submission of deliberately falsified information or any attempt to subvert a state regulatory scheme through corruption or coercive tactics, much less an attempt to deny petitioner or any other interested party access to the MPSC. Hence, this case involves no "sham" resort to a state agency as in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972), but rather a regulated utility's submission of a tariff containing a service that achieves substantial cost savings for consumers.

That respondent's lamp program has worked well and proved beneficial to consumers fully explains the lack of more extensive regulatory scrutiny than appears on the present record. The lamp program has been responsive to consumer demand and has furnished to respondent's customers longer-lived bulbs at prices lower than otherwise available with no direct profit to Detroit Edison. Indeed, no consumer or any other interested party including the

petitioner has challenged this service during a rate hearing before the MPSC or by complaint to the Commission. Rather than abdicating its responsibilities, the MPSC appears to have exercised "informed administrative judgment" in not challenging the program, as the SEC did in *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975).

On the other hand, should petitioner prevail in his attempt to apply the antitrust laws, and especially tie-in rules, in a highly technical way, the end result would be an increase in the cost of electric lighting to Michigan consumers. Such an effect would be plainly inconsistent with Michigan's regulation of public utilities which is designed to keep the costs of service as low as possible. State regulation of public utilities has virtually the same goals as the results achieved under competition, namely, the provision of service in response to customer demand at the lowest possible cost. Thus there is no inherent conflict between such regulation and the antitrust laws. Operation of Detroit Edison's lamp program manifests a regulatory purpose in harmony with the antitrust laws since it has provided customers with a desired service at lower prices than otherwise available.

The District Court rightly dismissed the complaint on the alternative ground that petitioner had deliberately declined to invoke the normal procedures which the MPSC had available to deal with the practice that he now challenges in this action.

To require the antitrust treble damage plaintiff challenging a state commission-approved action first to invoke the normal procedures available under state law will tend to assure that any antitrust case ultimately tried will not be burdened by novel, unresolved issues of state law or difficult questions of whether the state has in fact commanded the conduct in question.

This not only serves to make the federal judicial process more effective, but also serves the broader interest of assuring that the state authorities, who are responsible for the overall scheme, have the first opportunity to correct any deficiency. Such a prior resort to the proper state forum assures the regulated defendant that he will not have unwarranted treble damage recoveries visited upon him even where he has reasonably relied on the state regulator's approval. Prior resort, in this case, also assures that consumer interests which would be adversely affected by petitioner's claim will have a chance to be heard in a forum charged with protecting their interest.

Such a pragmatic type of approach was adopted by this court in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), where a federal regulatory scheme was at issue. It is even more appropriate where a state scheme is challenged, because in these circumstances an antitrust case necessarily infringes on an area with which the states have fundamental responsibility in our federal system, and the federal courts necessarily have less expertise. If the petitioner is allowed to recover treble damages without any prior resort to state processes, then others similarly situated will necessarily be encouraged to follow the same course and the normal state remedies will be short-circuited.

In sum, this Court should insure that the responsible state regulatory agency in fact serves the important function of "establishing a *first* line of defense against those competitive practices that might *later* be the subject of antitrust proceedings." *Gulf States Utilities* v. *Federal Power Commission,* 411 U.S. 747, 760 (1973) (Emphasis supplied).

Argument

I.

Detroit Edison's Lamp Supply Program Is Required by State Legislative Command and Should Not Therefore Be Subject to the Federal Antitrust Laws.

A. A Private Party Does Not Incur Liability under the Federal Antitrust Laws for Obeying the Command of a State.

Parker v. *Brown,* 317 U. S. 341 (1943) protects persons who comply with the command of a state from liability under the federal antitrust laws. In *Parker,* this Court made clear that conduct by private parties which might otherwise violate the antitrust laws was not subject to antitrust liability if "[i]t derived its authority and its efficacy from a legislative command of the state and was not intended to operate or become effective without that command." 317 U.S. at 350. Underlying that conclusion was the Court's recognition that in our federal system an act of Congress should not readily be construed as encroaching upon the legislative command of a state or as subjecting state action to its dictates. *See* H. First, *Private Interest and Public Control: Government Action, the First Amendment and the Sherman Act,* 1975 Utah L. Rev. 9, 42-53 (1975). Thus where the state, "as sovereign imposed the restraint as an act of government," 317 U.S. at 352, the federal antitrust laws do not apply.[27]

27. Most of the lower court decisions which have considered *Parker* refer to it as enunciating an exemption from the antitrust laws for state action when, technically, the holding is one of nonapplicability. *See* P. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown,* 69 Nw. U.L. Rev. 71 (1974).

Goldfarb v. *Virginia State Bar,* 421 U.S. 773 (1975), decided by this Court only last term, reaffirmed the rule that the antitrust laws do not apply to private conduct undertaken in compliance with the command of a state:

> The threshold inquiry in determining if an anti-competitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. 421 U.S. at 790.

Thus, even anticompetitive activities which are "compelled by direction of the State acting as a sovereign," 421 U.S. at 791, are not subject to the antitrust laws by virtue of *Parker* v. *Brown.*[28] *See also Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 706-707 (1962).

In *Goldfarb* this Court found that the alleged command *was not* in fact an order from the State as sovereign but action by a merely quasi-public body, the Virginia State Bar, to protect the private economic interests of its members. Moreover, in *Goldfarb* there was no suggestion that the Commonwealth of Virginia, through its Supreme Court, either approved or required adoption of minimum fee

28. Petitioner's reliance upon *Olsen* v. *Smith,* 195 U.S. 332 (1904) (Petitioner's Brief at 20) for the proposition that the *Parker* holding excluded only state officials from the application of the antitrust laws is misplaced. Petitioner misreads the state licensing program involved there as somehow making state officials of the pilots. In fact, they were simply licensed by a state commission, just as doctors or lawyers are today. The pilots in that case enjoyed a status which derived from the state's limitation on entry into the occupation and this Court held that the pilots did not enjoy any illegal monopoly since they were performing their duties pursuant to state authorization. Thus private conduct pursuant to state law was excluded from the application of the antitrust laws.

schedules or even approved the Virginia State Bar Association's ethical opinions on such schedules.[29]

In *Parker,* this Court distinguished two situations which did not apply there and do not apply here. First, the Court said that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. *Northern Securities Co.* v. *United States,* 193 U.S. 197, 332, 344-47 [1904] . . ." 317 U.S. at 351.

Secondly, this Court left open the possibility of a state instrumentality "becoming a participant in a private agreement or combination by others for restraint of trade . . ." 317 U.S. at 351-352. The petitioner does not argue that the second situation applies to this case, although he appears to rely, at least in passing, upon two lower court decisions which deal with whether a governmental instrumentality may be subject to antitrust liability. *See Duke & Co., Inc.* v. *Foerster,* 521 F.2d 1277 (3d Cir. 1975); *Hecht* v. *Pro-Football, Inc.,* 444 F.2d 931 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), cited in Petitioner's Brief at 34 and 19 respectively.

Petitioner does misunderstand the first situation in attempting to apply it to what the MPSC has ordered with respect to the lamp supply program. Where the state

29. As this Court said in *Goldfarb*:

> . . . state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not *direct* either respondent to supply them, or *require* the type of price floor which arose from respondents' activities. Although the State Bar apparently has been granted the power to issue ethical opinions there is no indication in this record that the Virginia Supreme Court *approves* the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action . . . 421 U.S. at 790-791. (Emphasis supplied)

merely *authorizes* a private party to undertake *voluntary* action and the party voluntarily undertakes that action, antitrust immunity does not necessarily follow. Indeed, *Parker* said nothing more than this, while, at the same time, making clear that private conduct undertaken pursuant to the command of a state was not subject to the antitrust laws. In the present case Detroit Edison is not *voluntarily* complying with the tariff which it has filed, rather Detroit Edison is *compelled* by the State to follow its tariff, as made clear at pages 29-30 of this brief.

Petitioner's misunderstanding is reflected in the decisions upon which he relies. These decisions merely involve situations where the state has authorized private conduct and not compelled it. Thus, in *Northern Securities Company* v. *United States,* 193 U.S. 197 (1904), the government challenged what was, in effect, a merger between two railroads that had been effected under the aegis of a holding company, the Northern Securities Company which was formed pursuant to New Jersey law. The plurality opinion in that case made clear that New Jersey's corporate law, which merely authorized the formation of such a holding company, but certainly did not require it, provided no exemption from antitrust liability. The corporate law of New Jersey was merely a permissive statute which allowed a specific form of business organization and was obviously not designed to mandate specific conduct or provide continuing regulation of the merged railroad.

Schwegmann Brothers v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951), also relied upon by petitioner (Petitioner's Brief at 12, 21), does not apply to the facts of this case. *Schwegmann,* which arose prior to the McGuire Act, presented the question of whether the Miller Tydings Act preempted a Louisiana statute which created a cause of action for unfair competition on behalf of a manufacturer against a non-signing retailer who failed to adhere to a fair trade

program. The state law in question did not affirmatively require adherence by nonsigners and the manufacturer was under no obligation to institute suit against nonsigners.[30]

Continental Ore Co. v. *Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962), not relied upon by petitioner but cited in the Brief for the United States as *Amicus Curiae* ("Justice Department Brief") at 9, similarly lends no support to the proposition that private conduct compelled by a state is nevertheless subject to antitrust liability. The anticompetitive conduct of the Canadian government's purchasing agent in that case was simply not compelled by the Canadian government, even though the agent was acting in a manner *permitted* under Canadian law.

As a necessary corollary to *Parker,* this Court has also held that a private party incurs no liability under the federal antitrust laws for asking a state government to mandate conduct which might otherwise constitute an antitrust violation. *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 172 (1961). Moreover, this rule also applies to a state administrative agency. *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510-511 (1972). The only exception to this rule, annnounced in *California Motor Transport,* is where agency processes are used to block the access of other parties to the agency. Thus *Noerr, Pennington,* and *California Motor Transport* evince a strong commitment to the proposition

30. Petitioner's confusion derives from a misreading of certain dicta in the plurality opinion in *Schwegmann.* This language states: "Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." 341 U.S. at 389. To read this dicta for the proposition that private conduct compelled by a state is nevertheless subject to the federal antitrust laws, as petitioner does (Petitioner's Brief at 22), not only flies in the face of this Court's holdings in *Goldfarb* and *Parker* but also interprets the quoted language without regard to the facts in *Schwegmann,* where no state command was present.

that interested parties should have full access to government agencies and should be free to propose to such agencies a possible course of action that might otherwise run afoul of the antitrust laws because the agency represents the ultimate safeguard of the public interest.

This reasoning is particularly appropriate in the context of public utility regulation by a state agency. Public utility regulation involves a unique interaction between government and the private sector with ultimate responsibility lodged in the state to determine and set rates and services. Nevertheless the state is ultimately dependent upon initiatives from the regulated utility itself to propose such rates and services. *See* 1 A.E. Kahn, *The Economics of Regulation: Principles and Institutions* 20-57 (1970); C.F. Phillips, Jr., *The Economics of Regulation* 123-142 (1969). While this Court has recognized in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) that not every act[31] of a regulated utility should be considered an act of the state, nevertheless where a state commission approves a utility's proposed tariff and commands the provision of service in accordance with the tariff this creates a situation wholly different from unregulated private business. State action then exists by virtue of the commission's having "put its own weight on the side of the proposed practice by ordering it." 419 U.S. at 357. The implications of *Jackson* in this respect are discussed more fully at pages 38-39 of this brief.

In summary, Detroit Edison, like any other public utility is immune from antitrust liability, under *Noerr,* for submitting proposed tariffs to the MPSC. If these tariffs are then ordered into effect by the MPSC, the utility is protected by *Parker* from antitrust liability for furnishing the service commanded.

31. The issue in the present case is not whether Detroit Edison's tariff is the act of the State of Michigan, but whether the state has compelled Detroit Edison to adhere to its tariff, as discussed in greater detail at pages 38-39 of this brief.

B. Detroit Edison's Lamp Supply Program Is Required by a Continuing State Command.

Detroit Edison cannot unilaterally abandon its program of furnishing light bulbs without extra charge. It cannot simply supply light bulbs to some residential customers and refuse to supply them to others. Rather the lamp program is part of its tariffed service and it must offer that service to all eligible customers at the present rates so long as the tariff, and the MPSC's order approving the tariff, remain in force. In sum, Detroit Edison is not an ordinary business which can voluntarily change its terms of dealing, or simply refuse to deal. *Cf. United States* v. *Colgate & Co.,* 250 U.S. 300 (1919). Rather Detroit Edison is a regulated public utility subject to an effective command of the State of Michigan with respect to its tariffed service. This truth is obvious and fundamental, yet petitioner chooses to ignore it.

Quite simply, Detroit Edison's electricity rates, approved by the MPSC, embody the cost of the lamp supply program as a condition of service. Any unilateral abandonment of the lamp program would amount to a *de facto* rate increase to its customers. The customers would be paying the same rate for less service. In other words, they would be paying for light bulbs but no longer receiving them.

Not surprisingly, Michigan law plainly bars Detroit Edison from unilaterally instituting such a *de facto* rate increase. MCLA §460.6a. The present rates were put into force, as required by statute, pursuant to the "affirmative action" of the Michigan Public Service Commission. Furthermore, "[i]n fixing rates the commission acts in a legislative capacity; and an order of the commission establishing a utility rate must be construed as a statute of like character would be construed." *Michigan Bell Telephone Co.,* v. *Michigan Public Service Commission,* 315 Mich. 533, 24

N.W.2d 200, 205 (1946).[32] That command of the state binds Detroit Edison.

In summary, the combined effect of Michigan's public utility statutes as interpreted by the Supreme Court of Michigan is that the MPSC's approval of Detroit Edison's rates which include the cost of providing light bulbs, binds Detroit Edison by a state legislative mandate to continue that program until the MPSC may order otherwise. Unilateral abandonment of the lamp program would violate the MPSC's order putting the tariff containing the lamp program into effect and might subject respondent to possible criminal penalties, under MCLA §460.558, for willful failure to comply with an MPSC order just as deviation from the marketing plan in *Parker* would have imposed similar penalties upon producers. 317 U.S. at 347.

As outlined in *Goldfarb,* the instant action thus presents an instance where the conduct complained of is "compelled by the direction of the State acting as a sovereign." 421 U.S. at 791. Contrary to contentions by the Justice Department (Justice Department Brief at 10), Detroit Edison's lamp supply program is not a "wholly voluntary practice" but one which has been ordered into effect by the MPSC. The Justice Department appears to have accepted uncritically petitioner's statement of facts without reference to the orders of the MPSC or its predecessors which have been in effect without interruption since 1916 (269a).

32. The specific powers of the MPSC derive, in part, from the powers originally accorded the Michigan Railroad Commission (MCLA §460.551 et seq.) which powers, in turn, were transferred to the Michigan Public Utilities Commission upon abolition of the Railroad Commission (MCLA §460.53) and then to the MPSC upon abolition of the Public Utilities Commission (MCLA §460.4). The power over rates vested in the Railroad Commission (MCLA §460.552) and transferred ultimately to the MPSC stated that "... no public utility supplying electricity shall put into force any rate or charge for the same without first petitioning said commission for authority to initiate or put into force such rate or charge and securing *the affirmative action of the commission* approving said rate or charge." (Emphasis supplied).

C. Respondent's Situation Is Generally Similar to That in *Parker* v. *Brown* and *Gordon* v. *New York Stock Exchange.*

The facts of the present case are, in substance, similar to the situations presented in the leading antitrust cases involving state and federal regulation of private bodies. *Parker* v. *Brown* involved what was, in essence, a quite familiar situation, namely a private group or firm proposing a particular course of action which might restrain competition and the government's ordering this program into effect after an appropriate consideration. Similarly, this Court's very recent decision in *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975) involved fixed commission rates being proposed by a private body, the New York Stock Exchange, and accepted by a government regulator, the SEC, after what this Court found to be appropriate inquiry. In each case the antitrust claim was rejected after a considered look at a regulatory scheme.

Both cases would appear to rest upon a sound principle of public policy, namely that it is essentially unfair to impose antitrust treble damages upon conduct, even very anticompetitive conduct, which is within the scope of legislation authorizing it and which has been considered and approved by the appropriate regulatory body. To do so in the present case, where an unequivocal command of government is combined with substantial consumer benefits, would be to compound the unfairness implicitly condemned in both *Parker* and *Gordon.*

This broad parallel between *Parker* and *Gordon* emerges from even a cursory analysis of the two cases. Unfortunately, petitioner misreads *Parker* and ignores *Gordon.* The Department of Justice, without any analysis of the Michigan statutory scheme, simply accepts petitioner's characterization of the MPSC's authority.

1. *Parker* v. *Brown* Rejected Federal Antitrust Liability for Marketing Schemes Proposed by Agricultural Producers and Approved by the State.

Parker dealt with an attempt to stabilize the price for California's raisin crop which then represented one half of the world raisin crop. The program for stabilizing raisin prices was instituted under the California Agricultural Prorate Act which authorized the establishment of programs for marketing agricultural products under an explicitly anticompetitive standard: "so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." 317 U.S. at 346. Furthermore, the Agricultural Prorate Act's stated purpose was to conserve California's agricultural wealth and prevent "economic waste." 317 U.S. at 346.

Private initiative and involvement in developing a marketing plan constituted a basic, fundamental feature of the California Act. Thus the marketing program had its genesis in a petition by ten producers to the Agricultural Prorate Advisory Commission[33] to have the Director of Agriculture, an ex officio member of the Advisory Commission, select a marketing program committee from among nominees chosen by qualified producers within the zone affected. That committee of private persons formulated a proration marketing program which became effective under the statute when (i) approved by the Advisory Commission and (ii) ratified by 65% of the raisin producers in

33. In contrast to the MPSC, the Advisory Commission was no impartial public body consisting of disinterested citizens. Instead, four of its members were required to be engaged in the production of agricultural commodities, one was required to be an experienced commercial handler of agricultural products, one an experienced cooperative marketing handler of agricultural products, two were to represent consumers generally and one was to represent consumers of agricultural commodities for processing services. Law of June 3, 1933, ch. 754, §3, [1933] Calif. Stats. 1970-1971 (repealed 1967).

the zone owning 51% of acreage devoted to raisin production.

The marketing program was complex but its purpose was plain. Among other things, it provided that at least 50% of the entire crop go into a stabilization pool. Through this method of withholding a substantial part of the raisin crop from the market, the price of the product was maintained at a higher level than under normal competitive conditions.

In short, the agricultural program in *Parker* had definite adverse effects upon consumers. Indeed as this Court indicated in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 143 (1969) what California was doing was "maximizing the financial return to an industry" within its borders at the expense of distributors outside the state and consumers both inside and outside the state. Under those circumstances some more elaborate procedures to approve and implement the program were necessary than in the present case where the benefit to consumers is apparent, as pointed out in part II of this brief.

This Court upheld the privately initiated program under the antitrust laws, despite its plainly anticompetitive purpose and effect, because it was put into effect by the legislative command of the state.

Petitioner has misunderstood this Court's holding in *Parker* due to an apparent failure to comprehend the facts of that case. In *Parker,* the State of California was clearly *not* the initiator and actor in pursuit of state business (Petitioner's Brief at 19); rather, those initiatives to establish a particular program came from the producers themselves and it was their business as producers which benefitted from stabilization of prices. Contrary to petitioner's contentions, this Court *did* address itself to the question of when the acts of private enterprise taken pursuant to state authorization or approval are not subject to the antitrust laws. The Court squarely held that the Prorate Program

in question, which had its origins in private initiatives, nevertheless was not subject to the antitrust laws because those initiatives were approved by the state and derived their efficacy from the state's legislative command. In short, under *Parker* even private conduct which does not benefit consumers but which is authorized, approved and made mandatory by the state constitutes state action which is not subject to the antitrust laws.

2. *Gordon* v. *New York Stock Exchange* Rejected Federal Antitrust Liability for Fixed Commission Rates That Were Privately Proposed and Accepted by Government.

Last Term, this Court unanimously rejected an antitrust challenge to the New York Stock Exchange's long maintained and recently much controverted system of fixed commission rates. In essence what the Exchange had done in recent years was to propose fixed minimum commission levels to the Securities and Exchange Commission. The SEC then held an inquiry, often quite informal, and generally indicated without any order that it would allow a particular set of rates to go into effect without objection.

Because of high rate levels maintained by the Exchange in recent years the SEC's role has increased as the rates attracted a broad range of criticism from investors and public agencies. Accordingly, the Commission responded by holding more extensive hearings as this Court observed in *Gordon*.

The plaintiff in *Gordon* simply argued that the Stock Exchange was involved in classic price fixing, and that the SEC's oversight was beside the point. Yet this Court unanimously declined to accept that argument.

In fact, the SEC had not used its formal authority over "the fixing of reasonable rates of commission" under Section 19(b)(9) of the Securities Exchange Act of 1934 (15 U.S.C. § 78s(b)(9)). Instead, the SEC had used either

its traditional practice of private negotiation with the Exchange or informal hearings. *See* Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange,* 80 YALE L.J. 811 (1971). Yet the *existence* of the SEC's full power under Section 19(b)(9) combined with its exercise of informal authority led this Court to the conclusion that permitting the "interposition of the antitrust laws . . . would preclude and prevent . . . the operation of the Exchange Act . . ." 422 U.S. at 691. On this basis, the Court rejected all antitrust claims.

The parallel between the general procedure at issue in *Gordon* and that present in the instant case is obvious. Both the Stock Exchange and Detroit Edison have made continuing proposals to a governmental regulator over many years; and in both cases, the governmental body has accepted the proposal.

To the extent there are differences between the two cases, they favor Detroit Edison. First, Detroit Edison has been subject to continuing formal orders of the MPSC and its predecessors since 1916. Second, the Stock Exchange's fixed rates ran strongly counter to important investor interests that the SEC was under a statutory obligation to protect. The fixed rates were also strongly opposed before the SEC by the Department of Justice as well as various other interested parties, including both investors and their representatives. Only when investors and other interested groups demanded it did the SEC depart from its entirely informal procedures and hold less informal hearings. Here there has been no demand from any source whatsoever that the MPSC hold hearings or investigate the lamp supply program. Even if petitioner had made such a demand, there would appear to be no reason to require the MPSC to hold fuller hearings on the lamp supply program, which clearly benefits consumers (see discussion at pages 44-46), than those initially held by the SEC on fixed commission rates, which

clearly did not benefit investors. Third, Detroit Edison is in fact obliged to enforce the rate structure approved and ordered by the MPSC (see pages 29-30 above), while it was not at all clear that the New York Stock Exchange was required by the securities laws to enforce fixed minimum commissions. Even though the Stock Exchange might have unilaterally withdrawn its system of fixed rates, this Court was still unwilling in *Gordon* to impose treble damages for the rate fixing that the Exchange had proposed and that the Exchange's regulator had accepted.

D. The Courts of Appeals Have Consistently Applied *Parker* v. *Brown* To Protect Pervasively Regulated Utilities from Collateral Antitrust Attacks upon Their Rates and Service Offerings. These Decisions Are Sound and Are Fully Consistent with *Jackson* v. *Metropolitan Edison*.

The common principle which emerges from those lower court decisions which have expressly considered *Parker* v. *Brown's* applicability to a pervasively regulated public utility is that such a utility incurs no liability under the federal antitrust laws for providing service as required under a tariff that has been ordered into effect by the appropriate state regulatory body.[34] *See* e.g., *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *Business Aides, Inc.* v. *Chesapeake & Potomac Co.*, 480 F.2d 754 (4th Cir. 1973);

34. Both petitioner and the Justice Department rely upon certain lower court decisions applying *Parker* outside the area of public utilities for guidance in this case. Petitioner's Brief at 26-27; Justice Department Brief at 9-10. Such reliance is misplaced for the holdings in those cases are bottomed upon factual situations wholly different from that in the present case. Thus *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970) involved an attempt to subvert a state competitive bidding statute by coercive tactics. Similarly, *Woods Exploration and Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) involved the submission of deliberately falsified information to a state agency.

Gas Light Co. of Columbus v. *Georgia Power*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).[35]

Gas Light Co. of Columbus v. *Georgia Power Co., supra*, upheld a public utility's rate schedules against antitrust attack where the record revealed that the appropriate state regulatory commission had approved those rate schedules and ordered them into effect with modifications after a hearing. More recently in *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) the Fifth Circuit rejected what it considered, in effect, to be an antitrust attack upon the defendant's rates for telephone service which allegedly reflected monopolistic practices by its parent American Telephone and Telegraph Co. The Fifth Circuit reasoned:

> Regulation by a governmental body of the rates to be charged by a public utility is a classic example of the *Parker* v. *Brown* exemption. 518 F.2d at 1134.[36]

In affirming the Court of Appeals for the Sixth Circuit in this case, this Court would be applying the consensus

35. The Fourth Circuit's opinion in *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971), dealing with whether a regulated utility's promotional practices can give rise to antitrust liability, might be read as holding that the mere existence of a state regulatory framework also justified the invocation of *Parker* v. *Brown*. *See* Justice Department Brief at 9, n. 1. Respondent, however, does not rely on that argument. The facts of the present case involve a practice which is *required* under a tariff *ordered* into effect by a state commission. Respondent certainly does not mean to suggest that every action by a regulated public utility is beyond the scrutiny of the antitrust laws. *See Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). *Otter Tail*, of course, did not involve an antitrust challenge to a utility's provision of service pursuant to a tariff ordered into effect by a state regulatory commission; nor does the present case involve, as did *Otter Tail*, a refusal to deal aimed at excluding a competing utility system.

36. This represents the same position taken by the Justice Department as *amicus curiae* in *Parker* v. *Brown*:

> For example, in the field of public utilities a state can undoubtedly regulate rates without running afoul of the Sherman Act notwithstanding the fact that the rate regulation may embrace interstate commerce. Brief for the United States as *Amicus Curiae* at 64, *Parker* v. *Brown*, 317 U.S. 341 (1943).

among Courts of Appeals which have directly considered *Parker* in the context of state regulation of public utilities. These courts have refused to impose antitrust liability upon a public utility which has obeyed the command of a state in furnishing service pursuant to a tariff ordered into effect by the responsible state agency.[37]

This approach is entirely consistent with *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) despite the Justice Department's assertions to the contrary. *See* Justice Department Brief at 8, 11-12. The issue in the present case is not whether Detroit Edison's tariff is the act of the State of Michigan, but whether the State has compelled Detroit Edison to adhere to its tariff. *Jackson* was a suit pursuant to the Civil Rights Act of 1871 (42 U.S.C. §1983) where the plaintiff alleged deprivation of property without due process of law in violation of the

37. The District Court decisions cited by petitioner and the Justice Department hardly suggest a contrary consensus. *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania*, 298 F. Supp. 1109 (W.D. Pa. 1969) did not even involve a challenge to a practice embodied in approved tariffs. In *Marnell* v. *United Parcel Service of America, Inc.*, 260 F. Supp. 391 (N.D. Calif. 1966), the defendant had been exempted from rate regulation as to the challenged practice. *Chastain* v. *American Telephone and Telegraph Co.*, 5 CCH Trade Reg. Rep. ¶60,519 (D.D.C. 1975) involved a tariff which did not encompass the challenged practice while the tariff in *Macom Products Corp.* v. *American Telephone and Telegraph Co.*, 359 F. Supp. 973 (C.D. Calif. 1973) had not, generally, been acted on by state commissions and the court referred the matter to the primary jurisdiction of the Federal Communications Commission. Both *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 351 F. Supp. 1153 (D. Haw. 1972), *aff'd in part and rev'd in part*, 518 F.2d 913 (9th Cir. 1975) and *United States* v. *Pacific Southwest Airlines*, 358 F. Supp. 1224 (C.D. Calif. 1975), *cert. dismissed*, 414 U.S. 801 (1974) involved acquisitions and not service pursuant to a tariff put into effect by a state commission. As the latter opinion noted, approval of an acquisition does not require its consummation unlike approval of a tariff which requires performance of the service provided in the tariff. 358 F. Supp. at 1228.

Fourteenth Amendment[38] because the defendant public utility terminated service for nonpayment. In rejecting the plaintiff's claim, this Court held that the termination did not constitute state action under the Fourteenth Amendment.[39]

The result in *Jackson* rests upon facts that are quite different from those presented here. Detroit Edison is *required* to supply light bulbs according to a tariff which has been *ordered* into effect by the MPSC. In contrast, Metropolitan Edison was *allowed* to terminate service for nonpayment but was not required to do so. *See Srack* v. *Northern Natural Gas Co.*, 391 F. Supp. 155 (S.D. Iowa 1975) and *Condosta* v. *Vermont Electric Cooperative, Inc.*, 44 U.S.L.W. 2156 (D. Vt. 1975) which recognize the distinction made in *Jackson* between conduct by a utility which the appropriate state regulatory agency requires and conduct which the state agency merely permits. Finally, there was also some question in *Jackson* whether the provision of Metropolitan Edison's tariff allowing termination for delinquency in payment was even required to be filed with the state public utilities commission. Moreover, the tariff became effective 60 days after filing, absent commission disapproval, and did not require the affirmative action of the state commission, as here, in order to go into effect.

38. As Judge Stevens correctly indicated in *Lucas* v. *Wisconsin Electric Power Co.*, 466 F.2d 638, 654 *n.* 35 (7th Cir. 1972), *cert. denied*, 409 U.S. 114 (1973) the test of whether the federal antitrust laws apply to a regulated utility's conduct is not necessarily the same as the test for determining whether the Civil Rights Act of 1871 applies to that conduct.

39. As the Court stated:

> It may well be that acts of a heavily regulated public utility with at least something of a governmentally protected monopoly will be more readily found to be "state" acts than will be the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. 419 U.S. at 350-351.

II.

The Clear Benefit of Respondent's Lamp Supply Program to Consumers and the Absence of Consumer Objection Make Unnecessary More Detailed Regulatory Review.

Petitioner's repeated concern about the supposed lack of adequate regulatory scrutiny (Petitioner's Brief at 7-9, 23-27) of the lamp program is inconsistent with his own failure either to complain to the MPSC or to adduce any evidence of customer dissatisfaction with that program.[40] Petitioner argues that the MPSC had "virtually no knowledge about the light bulb program" (Petitioner's Brief at 23). Yet, it was petitioner who resisted efforts by Detroit Edison to submit additional testimony from a staff member of the MPSC concerning its supervision of the lamp program (170a-173a). In the absence of a complaint by petitioner or anyone else, the continuing regulatory oversight of the program since 1916 has been fully adequate.

An independent regulatory commission may, of course, have the duty on its own initiative to investigate a clear threat to the public interest in an area within its jurisdiction. *See Gulf States Utilities* v. *Federal Power Commission,* 411 U.S. 747 (1973); *Udall* v. *Federal Power Commission,* 387 U.S. 428 (1967). But a public agency does not have a duty to expend its limited resources in investigating practices which are consistent with its mandate to protect the public interest and which are not questioned by any interested person. Under such circumstances, an agency's "acceptance of [the particular practices] hardly represents abdication of its regulatory responsibilities. Rather . . . it manifests an informed administrative judgment that the [practices] were appropriate." *United States* v. *National*

40. Even petitioner's wife was pleased with the program (71a-72a). As petitioner testified at his deposition: "I just have my own complaint." (73a).

Association of Securities Dealers, Inc., 422 U.S. 694, 728 (1975). To hold otherwise would require a heavily burdened regulatory agency to divert staff and investigative resources from problem areas to areas in which there were no problems.

Thus the adequacy of the MPSC's oversight of the lamp program should be considered in terms of the most efficient use of limited administrative resources. In recent years the MPSC, like other utility commissions, has been faced with the need to evaluate service rates in light of increasing fuel, labor and capital costs as well as increasing environmental problems. The Commission has examined in detail, with full evidentiary hearings, all of the cost components in Detroit Edison's rates.

A. Detroit Edison's Lamp Supply Program Produces Substantial Benefits to Consumers and Is Consistent with the Goals of the Antitrust Laws.

The lamp program has been only one of the cost elements in Detroit Edison's rate structure. It has not required extensive scrutiny by the MPSC for reasons which are clear. First, the lamp program provides substantial cost savings to Detroit Edison's customers who obtain under it longer-lived bulbs at about 50 to 75% less than what the leading manufacturers recommend and the petitioner charges.[41] Second, the effective cost of the lamp program has not increased significantly in recent years in any way comparable to the increases in the other components of Detroit

41. As indicated at pages 6-9 above, respondent furnished longer-lived bulbs in 1972 at approximately 15 cents per bulb in contrast to petitioner's sale of shorter-lived bulbs at 32 cents. Moreover, a consumer would obtain 1350 hours at 15 cents under respondent's program but would have to pay approximately 60 cents to petitioner to get a comparable bulb life since petitioner's bulbs had a life of only 750 hours.

Edison's cost.[42] Finally, no electric consumer or other interested party has asked the MPSC to conduct an inquiry into the lamp program, which, of course, is not surprising in view of the program's popularity with customers (292a, 301a).[43]

In sum, what Detroit Edison has been providing under MPSC orders since 1916 is a lamp program which is inexpensive and widely used. It is squarely in line with Michigan's broad regulatory goal of providing reliable electric lighting service in response to consumer demand at the lowest possible cost. It is also consistent with the broad federal anti-trust goal of assuring "competition based on efficiency." *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 623 (1975). Indeed, the MPSC is faced with no conflict between its regulatory duties and the federal antitrust laws. Its regulatory goal corresponds to the results sought under competition, which the antitrust laws are designed to protect. Petitioner's objective is to protect traditional retailers by denying consumers the economies of mass purchasing of light bulbs on behalf of consumers and to substitute the higher priced, lower quality bulbs he offers.

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42. As indicated at pages 8-9 above, the per customer cost of the lamp program in 1972 was $1.80 while the current cost is $2.00. This represents an annual rate of increase of approximately 3%-4%. By contrast, Detroit Edison's labor and fuel cost has increased at a far greater rate since 1972, despite diligent efforts to keep them down. *See Moody's Public Utility Manual* at 36-37 (1975).

43. Nor has any municipality challenged the program before the MPSC. *See* MCLA §460.54. Petitioner, however, apparently misunderstands the MPSC's investigatory duties under MCLA §460.54 (Petitioner's Brief at 12-13) which requires the MPSC to "make full investigation as to all matters so submitted" by a municipality. Here no such submission by a municipality has been made. The logical inference to be drawn from this fact is that no municipality has any objection to the program.

As the Court of Appeals for the District of Columbia Circuit has made clear:

> it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible. For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital, thereby avoiding monopoly profits. Another example of their common purpose is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better service at a lower cost. This analysis suggests that the two forms of economic regulation complement each other.[44] *Northern Natural Gas Co.* v. *Federal Power Commission,* 399 F.2d 953, 959 (D. C. Cir. 1968).

To summarize, the Detroit Edison lamp program clearly presents a case where federal antitrust policy and state regulatory policy serve the same ends;[45] and the MPSC is

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44. Petitioner has not contended—nor could he—that Detroit Edison has obtained a monopoly profit on its provision of light bulbs. Quite the contrary, Detroit Edison sells at a price which reflects only its direct costs in contrast to petitioner's 50% mark-up. Thus, in fact, the lamp program approximates the long run equilibrium under perfect competition where all profit other than a return on capital is eliminated. See E. Gellhorn, *Introduction to Antitrust Economics,* 1975 DUKE L.J. 1 (1975); E. Mansfield, *Microeconomics* 245 (2d ed 1975). This is important and pertinent here because a key traditional concern of antitrust tie-in theory is that control of one product will be used to create monopoly profits in a second product. *See,* P. Areeda, *Antitrust Analysis* 569 (2d ed. 1974).

45. This Court has repeatedly held that a state regulatory scheme which manifests a policy in harmony with that of an applicable federal statute should not be preempted by the federal enactment. *See,* e.g., *Florida Avocado Growers* v. *Paul,* 373 U.S. 132 (1963); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218 (1947). Yet petitioner attempts to achieve just such preemption here by imposing antitrust

entitled to rely on this fact in continuing to order into effect tariffs containing the program. A regulatory agency charged with serving the public interest cannot "close its eyes to facts" indicating an antitrust violation by refusing to hear parties appropriately seeking an antitrust inquiry. *See, e.g., Denver & Rio Grande Western Railroad* v. *United States,* 387 U.S. 485, 492 (1967). But no court has required a regulatory commission to conduct an antitrust inquiry into a practice when no interested party has requested such a hearing and no evident harm to the public is involved.

B. Petitioner's Antitrust Claim Is Adverse to the Public Interest Which the MPSC Has Served in Mandating Respondent's Lamp Supply Program.

Petitioner has offered an unusual and highly technical antitrust theory[46] which, if accepted, would cost Detroit Edison's customers millions of dollars. Elimination of the lamp supply program would deny customers in Detroit Edison's service area the advantages obtained from competitive bidding among the three major light bulb manufacturers. Detroit Edison provides these light bulbs to

liability upon respondent for having acted in conformity with state regulation which was in harmony with the aims of competition. *See* P. E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker* v. *Brown,* 69 NW. U.L. REV. 71 (1971); Comment, *Parker* v. *Brown: A Preemption Analysis,* 84 YALE L.J., 1164 (1975).

46. It is respondent's position that it is offering a single product to customers in the form of electric light service, as ordered by the MPSC. To apply petitioner's notion that this nevertheless constitutes a "tie-in" might, by the same logic, prevent an electric utility from requiring customers to obtain a meter from the utility. Application of petitioner's novel theory to other regulated industries might result in a conclusion that the airlines have tied "free meals" to passenger flights and have thus monopolized the market for airline passenger meals.

consumers at cost while petitioner obtains a 50% mark-up.[47] Indeed, petitioner and the members of his class rigorously adhere to the suggested retail price for light bulbs (70a).[48] Instead of a cost of $2,835,000 for 18.5 million light bulbs, as in 1972, consumers in respondent's service area would be likely to pay nearly $6,000,000,[49] if they purchased the same amount of light bulbs from retailers such as petitioner. In other words, the cost to consumers would increase by more than $3,000,000.

The consumers' loss would be others' gain. Three groups would benefit: First, light bulb manufacturers would no longer engage in hard competitive bidding for Detroit Edison's business;[50] second, the traditional wholesalers who are made redundant by Detroit Edison's direct purchasing from manufacturers; and, third, the petitioner's class of high mark-up retailers. Given the history of competition[51] in the electric light bulb industry, the likely result of petitioner's success would be to make Detroit Edison's retail customers subject to a "rigid price floor" from which they

47. Indeed, the retail druggists which petitioner seeks to represent have historically been staunch supporters of resale price maintenance and were one of the few supporters of "fair trade" during the recent consideration and repeal of this federal enabling legislation by Congress. *See* "Statement of the National Association of Retail Druggists," in *Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess., pt. 1 at 303-308 (1975).

48. Petitioner has testified that all of his light bulb sales were at the manufacturer's pre-ticketed prices and that he never thought of selling at a different price (67a). He also testified that he has never had light bulbs "on sale." (67a) When asked whether he knew of any retailers who sold light bulbs at other than the pre-ticketed price, he answered, "Amongst my friends I don't." (67a)

49. 18.5 million x 32 cents, petitioner's resale price for 100 watt bulbs (324a).

50. This competitive bidding is reflected not only in prices but in the manufacturers' supply of 60% longer-lived bulbs than they offer to the public generally.

51. A. Bright, *The Electric Lamp Industry,* Chs. IX, XI (1972).

could not easily escape.[52] *Cf. Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792 (1975).

In short, successful prosecution of petitioner's antitrust theory would result in preserving the interests of high-margin retailers rather than in serving the public's interest in the efficient provision of electric lighting at a low cost. This being so, the MPSC is not "strictly bound by the dictates" of the antitrust laws, for to accept petitioner's antitrust theories would contravene a state goal of "overriding importance," to provide service at the lowest possible cost to consumers. *See Northern Natural Gas, supra* at 961: *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 328 Mich. 650, 44 N.W. 2d 324 (1950), *aff'd,* 341 U.S. 329 (1951).

What the MPSC has done is accept and order into effect a Detroit Edison program which on its face serves consumers and is consistent with the broad policies of the Federal antitrust laws and Michigan public utility law. The program has been ordered into effect repeatedly, without objection or question from any interested party. Yet petitioner now argues that such regulatory scrutiny was not adequate, on the basis of a technical antitrust theory which has never been raised before the Commission. In so doing, he would impose retrospective treble damages on respondent and prospective higher costs on consumers. Such a result is not only inequitable, it is unsupported by any decision of this Court.

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52. The Department of Justice does not reflect in its brief any of its historic concern about competitive conditions in the light bulb industry. *See United States* v. *General Electric Co.,* 272 U.S. 476 (1926); *United States* v. *General Electric Co.,* 358 F. Supp. 731 (S.D.N.Y. 1973).

III

Petitioner's Failure To Invoke Available State Remedies Should Preclude His Present Action for Treble Damages.

Petitioner seeks antitrust treble damages for a regulated utility's cost-saving practice which was approved by its utility commission. He predicates his theory on inadequate regulatory supervision of the program and/or lack of state commission jurisdiction over it. Yet, he has made no attempt to utilize, let alone exhaust, the available state remedies with regard to the program in question. Instead, he seeks to avoid the well established regulatory procedures and to burden the federal antitrust courts with novel claims under Michigan law which should first be resolved through the MPSC and the courts of Michigan.

This is not the result of accident or oversight as is demonstrated in the following colloquy between plaintiff's counsel and the District Court (175a):

> Mr. Sklar: . . . [I]t may well be theoretically at least, the Michigan Public Service Commission can tell Detroit Edison to avoid including the cost of the light bulbs in its rate base for purposes of determining its rates, but we don't believe that the Michigan Public Service can tell Detroit Edison that it can't sell light bulbs, or that it can't sell tiddly winks, or it can't build a building.
>
> The Court: *Have you tried?*
>
> Mr. Sklar: *No, we have not.* We feel it is an antitrust case, and we're interested in the damages as well as injunctive relief.
>
> The Court: More damages than injunctive relief?
>
> Mr. Sklar: I would say actually certainly the damages takes care of the past, the injunctive takes care of the future.
>
> The Court: Why should we worry about the past? This has been under a state regulatory body, why not just worry about the future [if] it is a bad practice?

> Mr. Sklar: Well, this is a *crucial question* as to whether or not it has been under a state regulatory body. It is our contention that, in fact, it has not been under a state regulatory body. (Emphasis supplied.)

This colloquy clearly forms the basis for the District Court's *Parker* holding that, "[c]ertainly the [antitrust] court should not step in when the Commission has not even been approached by plaintiff." (60a)

Respondent urges this court to affirm that holding and to announce a rule which prevents this plaintiff, and others like him, from short-circuiting the normal remedies available at state law. To do so, would avoid inequitable treble damage recoveries, while providing the public with protection against anticompetitive practices which the state regulator found unwarranted. This would occur in a forum where notice to consumers affected is provided for and the right to consumer intervention is present, rather than in an antitrust court where the battle may be confined to two opposing private parties. At the very least, resort to state remedies may clarify any doubts as to the scope of the state regulator's jurisdiction and help make clear to an antitrust court the answer to Mr. Sklar's "crucial question" —namely "whether or not [the challenged practice] has been under a state regulatory body." (175a) Thus, at the very least, insistence upon "adjudication of that dispute by the Commission promises to be of material aid in resolving the [*Parker* v. *Brown*] immunity question." *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 302 (1973). Stated alternatively, it spares this Court or any other antitrust court from having to resolve without any prior assistance, the types of state law questions raised by petitioner at pages 27-38 of its brief.

A. Adequate State Remedies Were Available to Petitioner.

Petitioner had several courses open to him within the state regulatory process. First, he could have sought discontinuance of the program in the course of the MPSC's rate hearings which have occurred on an almost annual basis. *See* MCLA §460.6a which allows intervention in a rate case by any interested party. Indeed, two such rate hearings, U-4570 and U-4807, took place during the pendency of this action. Here the petitioner's remedy (as his counsel conceded to the District Court) would be to seek an MPSC order to "Detroit Edison to avoid including the cost of the light bulbs in . . . its rates." (175a) Petitioner is free to argue before the MPSC (contrary to our belief) that the lamp program is discriminatory, excessively costly or otherwise contrary to the public interest. If the MPSC were to accept petitioner's position, it could then order the cost of the program excluded from respondent's rates.[53] This would necessarily terminate the program since Detroit Edison would not continue it if it could not recover its costs.

Second, petitioner on his own initiative, could have used the MPSC's complaint procedure under MCLA §§460.58 and 460.557 to obtain relief against the lamp program. That procedure allows a complainant without need of counsel to challenge a utility's "alleged unlawful or unreasonable acts, practices, or omissions..." Mich. Admin. Code (1968 Supp.) R 460.31. The MPSC has broad powers conferred directly and by inheritance from its predecessors, and these are sufficiently broad to give it direct control over Detroit Edison's lamp program even apart from its *de facto* power through the rate process. Thus, the preamble of P.A. 1909 No. 106, which first vested power over electricity in the

53. *See Hartford Electric Light Co., supra; Wisconsin Gas & Electric Co., supra; Customers of Electric Illuminating Co. of Boston, supra,* discussed at page 5 above, where state utility commissions discontinued lamp programs for infrequent use and hence discriminatory effect.

Michigan Railroad Commission, stated that its purpose was "to regulate the charges to be made for electricity so transmitted; to regulate the *rules and conditions of service* under which said electricity shall be furnished . . ." (Emphasis supplied). MCLA §§460.557 and 460.4 empower the MPSC to "establish such rules and conditions of service as shall be just and reasonable." Moreover, in allowing Detroit Edison to discontinue the lamp program as to a class of commercial customers, the MPSC in U-1791 specifically asserted jurisdiction over the program. Indeed, such regulatory power is a necessary concomitant to its authority over a "public utility" engaged in *"furnishing . . . electricity for the production of light, heat or power . . ."* MCLA §460.501 (Emphasis supplied). *Cf. United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968).

Furthermore, petitioner has pointed to no authority which would prevent the MPSC from considering the competitive impact of the lamp program.[54] This Court has recognized that a responsible regulatory agency "serves the important function of establishing a first line of defense against those competitive practices that might *later* be the subject of antitrust proceedings." *Gulf States Utilities* v. *Federal Power Commission*, 411 U.S. 747, 760 (1973) (Emphasis supplied). *See, e.g., Northern California Power Agency* v. *Public Utilities Commission*, 5 Cal. 3d 370, 486 P.2d 1218 (1971).

B. Petitioner Seeks to Burden Federal Antitrust Courts with Novel State Law Questions Which Could Be Resolved by the MPSC and Its Reviewing Courts.

Having failed to avail himself of state remedies, petitioner now argues that these remedies are not available under

54. In setting rates the MPSC is required to give "due weight to all lawful elements . . ." MCLA §460.557.

Michigan law (Petitioner's Brief at 27-38).[55] While the MPSC has asserted its continuing jurisdiction over the lamp program and this authority has not been challenged in the Michigan courts, petitioner would now have this Court determine what power a state statute has conferred upon a state agency.

We believe petitioner's state law arguments are unsound but will not burden this Court with a lengthy discussion of these issues. Petitioner's argument on the MPSC's jurisdiction rests largely upon *Huron Portland Cement Co.* v. *Michigan Public Service Commission*, 351 Mich. 255, 88 N.W. 2d 492 (1958), where the MPSC itself had *denied* the existence of its claimed authority. The situation is plainly different where the MPSC has asserted jurisdiction, for an administrative agency is generally the best judge of its own powers. *United States* v. *Southwestern Cable Co., supra; Board of Governors of the Federal Reserve Board* v. *Agnew*, 329 U.S. 441 (1947). Moreover, to deny the MPSC's jurisdiction in such circumstances runs counter to Michigan policy. As the Michigan Supreme Court recently made clear a "party aggrieved by the provisions of a tariff," as here, should ordinarily "seek relief by an attack upon those provisions" before the MPSC. *Valentine* v. *Michigan Bell Telephone Co.*, 388 Mich. 19, 26, 199 N.W.2d 182, 185 (1972). *See also Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 328 Mich. 650, 44 N.W.2d 324, 330 (1950), *aff'd*, 341 U.S. 329 (1951) which stated that the Michigan legislature has delegated

55. Petitioner is not wholly consistent on this issue. In the colloquy quoted above, petitioner's counsel conceded "it may well be theoretically at least, the Michigan Public Service Commission can tell Detroit Edison to cease including the cost of the light bulbs in its rate base for the purpose of determining its rates." (175a); yet in his brief petitioner argues in favor of the "MPSC's statutory duty to make full investigation of all matters [submitted]." Petitioner's Brief at 12-13. The latter point is subject to the qualifications indicated at page 42 above.

the power to exclude competition in the public interest to the MPSC.

Petitioner's second novel state law argument to this Court is the claim that "Michigan has delegated its sovereign authority over public utilities to the municipalities . . . ," Petitioner's Brief at 34-38. This argument is equally unsound. Petitioner relies principally on *Detroit Edison Co.* v. *City of Wixom*, 10 Mich. App. 218, 159 N.W. 2d 230 (1968), *rev'd on other grounds*, 382 Mich. 673, 172 N.W. 2d 382 (1969), an intermediate court decision holding that a municipal zoning ordinance took precedence over the MPSC's determination of a right of way. Whatever the extent of their zoning powers, Michigan's municipalities appear to have no power, by enactment, to regulate a utility's provision of service and such power cannot be inferred from their control over streets. Mich. Const. Art. VII, § 29 (1963). *See City of Jackson* v. *Consumer Power Co.*, 312 Mich. 437, N.W.2d 265 (1945); *City of Detroit* v. *Public Utilities Commission*, 288 Mich. 267, 286 N.W. 368 (1939); *City of Niles* v. *Michigan Gas & Electric Co.*, 273 Mich. 255, 262 N.W. 900 (1935); *City of Kalamazoo* v. *Titus*, 208 Mich. 252, 175 N.W. 480 (1919). While municipalities may contract with public utilities for service at specified rates pursuant to the granting of a franchise and thereby exclude MPSC authority over such rates (MCLA §460.54), no such franchised rates govern Detroit Edison.[56]

In sum, petitioner asks this court to resolve his eleventh hour state law arguments in order to reach his federal antitrust claim. While, we believe, these arguments are unsound, a more fundamental point is really at issue: this court should not have to delve into an admittedly complex state regulatory scheme where more expert decision makers are available initially to resolve or at least clarify the problems.

56. All of respondent's franchises granted since 1961 also provide that the franchise is subordinate to an order by the MPSC (54a-55a).

C. Requiring Prior Resort to State Regulatory Procedures Should Clarify Any Unresolved Issues Relating to *Parker* v. *Brown* Immunity and Thereby Reduce the Risk That a Regulated Utility Would Suffer Treble Damage Liability for Reasonable Reliance on State Commission Action.

The District Court dismissed the petitioner's complaint because it found that the MPSC had mandated Detroit Edison's lamp supply program. We believe that this holding should be affirmed for the reasons stated above. The District Court also made what amounts to an alternative holding that, in any event, petitioner's complaint should be dismissed because "the Commission has not even been approached by plaintiff." (60a) That alternative holding should be affirmed even if this Court were not to find a direct state command over the lamp program.

We recognize that the interplay between the antitrust laws and regulation presents a "problem . . . which . . . is recurring," as this Court said in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 299 (1973). That "problem arises when conduct seemingly within the reach of antitrust laws is also at least arguably protected or prohibited by another regulatory statute . . . [which] [o]ften, but not always . . . includes an administrative agency with authority to enforce the major provisions of the statute. . . ." 409 U.S. at 299-300.

In *Ricci*, this Court resolved the recurring problem by requiring the responsible regulatory agency to consider the issues first before the antitrust court proceeded. There the private antitrust plaintiff alleged that he had been deprived of a seat on a regulated commodity exchange in violation of the Sherman Act, as well as the Commodity Exchange Act. This court ordered the Commodity Exchange Commission to consider this dispute first because: "some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Com-

modity Exchange Commission; and . . . adjudication of that dispute by the Commission promises to be of material aid in resolving the [antitrust] immunity question." 409 U.S. at 302. The Court stressed the importance of having such questions "dealt with *in the first instance* by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in this case." 409 U.S. at 305 (Emphasis supplied). It pointed to "the agency's superiority in gathering the relevant facts and marshaling them into a meaningful pattern [citation omitted]," 409 U.S. at 306. Substantial judicial economies, the Court pointed out, would be effected since "the adjudication of the Commission . . . would eliminate any necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision." 409 U.S. at 306. Finally, the Court stressed that the prior agency action would help assure a correct disposition of any antitrust case:

> Affording the opportunity for administrative action will "prepare the way, if the [antitrust] litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the [regulatory] statute as applied to [these] particular circumstances." 409 U.S. at 306.

Such a pragmatic approach is even more appropriate where a state regulatory scheme is at issue. Rather than retaining jurisdiction to determine all questions of federal law, as was deemed appropriate in *Ricci*, a federal court should dismiss an antitrust claim when available state remedies have not been utilized and where unresolved questions of state law may remain.

A federal antitrust court cannot be presumed to have any particular expertise with respect to the state scheme and it would necessarily have to look to past state court decisions for authoritative guidance. Where the state law questions are complex, novel, or otherwise difficult, a federal court is essentially left at sea with few wholly reliable aids to chart its course. By contrast, a federal court can more authoritatively determine issues raised under a *federal* regulatory scheme where it is necessary to decide an antitrust case. *See, e.g., United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963).[57]

It is, thus, especially appropriate when state regulatory jurisdiction and remedies are involved to insist that the prospective antitrust plaintiff invoke the state remedy prior to initiating an antitrust suit, to "obviate any necessity for the antitrust court to relitigate the issues" and to insure "a more informed and precise determination" by the antitrust court of any recurring immunity question. *See Ricci, supra*, at 306.

If the petitioner were required to invoke the available MPSC remedies, any one of several results might follow. Each possible result would be helpful to an antitrust court faced with a subsequent *Parker* v. *Brown* issue.

First, the MPSC might possibly determine (contrary to our view) that it did not have jurisdiction over the lamp program (as it determined lack of jurisdiction in *Huron Portland Cement Co.* v. *Michigan Public Service Commission, supra*) or a reviewing court might determine that the Commission did not have jurisdiction. Petitioner would then be able to bring his antitrust suit free of *Parker* v. *Brown* issues.[58]

Second, the MPSC might assert jurisdiction but withdraw its approval. If respondent continued the lamp pro-

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57. This is what the Court of Appeals in *Ricci* had done with respect to the issue of the Commodity Exchange Commission's jurisdiction over the matter in question.

58. Of course, the issue of reasonable reliance by the utility on the Commission's jurisdiction might well preclude any retrospective treble damage liability. *See Simpson* v. *Union Oil*, 377 U.S. 13, 24-25 (1964); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1972), discussed below at page 57.

gram without benefit of an order of the MPSC, petitioner would then be free to initiate whatever antitrust claim he might think he has.

A third possibility (and no doubt the possibility that the petitioner fears), is that the MPSC would consider the petitioner's evidence and arguments together with those of respondent and any consumer representatives or other interested parties, and conclude, as it has since 1916, that the program is in the public interest and must be continued. Petitioner would be free to challenge any such decision in the Michigan courts. Such a decision, if affirmed by the reviewing courts of the State of Michigan, would make crystal clear to any subsequent federal antitrust court that which respondent believes is already clear—namely that the lamp program was compelled by the State of Michigan as sovereign and that any antitrust claim is barred by *Parker* v. *Brown*.

Needless to say, any one of these results would materially assist a federal antitrust court in any subsequent suit. More than that, such prior resort would give due regard to the legitimate interest of the state as sovereign in a federal system. If there were remaining antitrust issues they could then be raised in a federal court. *See Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 306; *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). Following resort to available state remedies, an antitrust "court will be in a much better position to determine whether the antitrust action should go forward." 409 U.S. at 306. In sum, prior resort to the MPSC represents a sound and orderly process of adjudication.

Much more, however, is at stake than just orderly adjudication. Fundamental questions of equity are raised by allowing federal courts to impose a stringent treble damage liability on a regulated utility which has reasonably relied on its submissions before a state regulatory commission.

See Simpson v. *Union Oil Co.*, 377 U.S. 13, 24-25 (1964) and *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1972). In *Simpson* this Court said specifically: "We reserve the question whether, *when all the facts are known*, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today." (Emphasis supplied.) Similarly, in *Chevron*, this Court stressed that it was important to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect." Quite simply, when treble damages might be imposed against a regulated enterprise for conduct that it fully disclosed to its regulator and the regulator's approval has been obtained, the antitrust court should have the benefit of "all the facts"—all the facts relating to the exact operation of the practice and the exact nature of any reliance by the defendant upon the regulator's approval. The way to assure that this happens is to require the would-be antitrust plaintiff to resort first to the state agency and take advantage of the state "agency's superiority in gathering the relevant facts and marshaling them in a meaningful pattern." *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 498 (1958), quoted in *Ricci*, 409 U.S. at 306.

D. Allowing Antitrust Treble Damage Recovery Would Discourage Use of Normal State Administrative Processes.

Michigan law requires that where a "party [is] aggrieved by the provisions of a [utility's] tariff," he should ordinarily seek relief by challenging the tariff before the MPSC. *Valentine* v. *Michigan Bell Telephone Co.*, 388 Mich. 19, 26, 199 N.W.2d 182, 185 (1972). This reflects the normal approach of state utility regulation in Michigan and elsewhere, which is generally to provide a system of prospective relief. The MPSC, like other utility commissions, has

a complaint procedure which enables it to order discontinuance of a regulated utility's conduct that the Commission finds to be contrary to the public interest. *See* MCLA §§ 460.58 and 460.557. Such an approach allows the regulated utility to operate in the context of knowing what the rules of the game are and at the same time allows the public or the Commission to secure correction of any utility practice which does not serve the public.

This whole process of orderly state Commission consideration of disputes and prospective correction will clearly be subverted if parties such as the petitioner are allowed to short circuit it entirely by going straight to federal court and obtaining retrospective treble damages. No potential plaintiff would be likely to invoke the state utility regulation scheme of prospective relief if the nearby federal court is going to offer him retrospective treble damages as an alternative. Indeed, the incentive to avoid the normal state forum is one not only of money damages but of litigating tactics. If the potential plaintiff avoids the normal commission remedies, he can, just as petitioner has done here, rely on bare arguments that the utility commission does not have jurisdiction, or has not considered the question, or has not commanded the practice at issue. The federal antitrust laws should simply not allow a would-be plaintiff to deliberately avoid state regulatory procedures and then manipulate any uncertainty about whether a state command existed into a conclusion that such a command was not present.[59]

In sum, no one can deny that an antitrust plaintiff should have his day in court, if, indeed, he has a meritorious antitrust claim; but he should not be encouraged to short-

59. Such a result would, in effect, subject state regulated public utilities to the possibility of conflicting standards of conduct which "must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs." *Hanna* v. *Plumer*, 380 U.S. 460 474 (1965) (Harlan, J., concurring).

circuit the normally available state remedies. Both goals can be accomplished by insisting that the plaintiff first invoke the appropriate state remedy and then proceed with whatever antitrust treble damage claim is still available.

E. Requiring Resort to the Michigan Public Service Commission Would Assure Consideration of the Lamp Program by a Body Which Will Give Notice to Consumers and Consider Their Interest.

Petitioner's antitrust claim consists of the bare technical argument that Detroit Edison is engaged in tying the sale of light bulbs to the supply of electrical power (see pages 2 and 44 above). Petitioner clearly wants this issue resolved, preferably under a *per se* rule, without any regard to the losses that such a victory would impose upon electricity consumers in Michigan. He wants this important consumer issue resolved in an antitrust court simply as a private adversarial dispute between him and Detroit Edison.

Yet this is not just a private dispute. It is a dispute in which Michigan consumers have a $3,000,000 stake (see pages 44-45 above); and the MPSC offers a public forum for assuring that the consumer interest is heard and protected. This agency has a statutory responsibility to protect electricity consumers and has available procedures for giving notice to consumers throughout the utility service area of pending proceedings which affect their interests. When the Commission holds a proceeding, the affected consumers can participate[60] together with the Commission staff to assure that the consumer interest is fully considered and protected. Petitioner may not want this but the public interest requires it.

In sum, where a private antitrust case would have a clear adverse affect on consumer interests in the regulated sector,

60. *See* Mich. Admin. Code (1968 Supp.) R460.21-R460.27. During the pendency of this action, two rate cases, U-4570 and U-4807 took place and petitioner could have intervened in either proceeding.

it is doubly necessary that the underlying question should be aired fully and publicly by the state agency that possesses the capability and the continuing responsibility to consider consumer interests. The fact that such a careful consideration leads to an order in effect barring an antitrust claim on *Parker* v. *Brown* grounds may be unacceptable to the petitioner but it would be more than acceptable to the consuming public.

This point as well as those which precede it all lead to the same conclusion, that the process of orderly regulation of utilities, conservation of federal judicial energies, protection of regulated enterprises against unwarranted treble damages, and protection of consumers can and should be accomplished by requiring the potential antitrust plaintiff who wishes to challenge Commission-approved action, first to invoke available processes of the Commission before instituting a private treble damage action. To do so, is not to bar a future antitrust action if merited, but to assure that those actions will be applied only where they do have true merit and do not interfere with legitimate commands of the state. Such a process is not only more orderly and efficient, but it is more consonant with a federal system of dual sovereignty.

Conclusion

We do not ask this court to give public utilities a carte blanche to violate the antitrust laws in order to serve themselves at the expense of their customers. We do ask that they be allowed to perform their public duty of serving their customers by providing essential services at low costs, under state supervision and direction, without being subject to treble damages for their effort.

Respondent's lamp program involves low cost service to the public and is subject to an effective command of the State of Michigan. Accordingly, *Parker* v. *Brown* precludes

petitioner's suit for treble damages. In any event, that action is premature and should be dismissed because of petitioner's failure to exhaust available state remedies.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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January, 1976